



# MONTANA WATER COURT

DATE  
HB

#10

2/5/2013

## STATE OF MONTANA

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February 5, 2013

Rep. Steve Gibson, Chair  
Appropriations Subcommittee  
Judicial Branch, Law Enforcement, and Justice  
Montana Legislature  
State Capitol Building  
Helena MT 59620-1705

**Re: Water Court Status Report as Required by Section 85-2-281(1), MCA**

Dear Chairman Gibson:

This letter represents the Water Court's status report to this appropriations subcommittee as required by Section 85-2-281(1), MCA.

### Background

The urgency and struggle to document, adjudicate, and to administer Montana's water rights has ebbed and flowed for more than one hundred years. The Legislature has grappled with the uncertainty of the state's water right system on many occasions. A few examples illustrate the more recent efforts.

In 1939, the Legislature declared that the "waters of this state and especially interstate streams arising out of the state **be investigated and adjudicated as soon as possible** in order to protect the rights of water users in this state . . ." Section 89-847 R.C.M. 1947 (emphasis added.).

In 1973, the Legislature enacted the Water Use Act and stated that "the department [DNRC] . . . **shall, as soon as practicable, begin proceedings under this act to determine existing rights.**" Sec. 6, Ch. 452, L. 1973 - originally codified as 89-870 R.C.M. 1947 (emphasis added).

In 1975, three federal lawsuits were filed. In 1979, four more federal lawsuits were filed. These lawsuits sought to adjudicate the water rights of several Indian Tribes, the United States, and other water users in general stream adjudications filed in the federal district court system. The filing of these lawsuits increased the level of legislative urgency.

"... to expedite and facilitate the adjudication of existing water rights."  
CH.697 L. 1979

2000



In 1979, the Legislature enacted Senate Bill 76 and amended the Water Use Act "to **expedite and facilitate the adjudication of existing water rights.**" Sec. 1, Ch. 697, L. 1979 (emphasis added). Pursuant to SB 76, the Montana Supreme Court issued an order requiring every person claiming ownership of an existing water right to file a statement of claim for that right with the DNRC no later than January 1, 1982. Stockwater and domestic claims for groundwater or instream flow were exempted from this process, although such claims could be voluntarily filed. Existing water rights not filed by the deadline would, by statute, be conclusively presumed to have been abandoned.

The deadline was extended to April 30, 1982. More than 200,000 claims were received by the deadline as well as a number of late filed claims after that deadline. In 1992, the Montana Supreme Court ruled that untimely filed claims were forfeited.

In 1993, the legislature passed Senate Bill 310 which provided, under certain terms and conditions, the remission of the forfeiture of existing rights caused by the failure to comply with the April 30, 1982, deadline. Essentially, the remission bill revived previously forfeited late claims and allowed an opportunity for users to file additional late water right claims in the general adjudication process. The priority date of a late claim may be subordinated to other timely filed existing water rights. The deadline for filing late claims was July 1, 1996. Approximately 4,900 late claims were filed by the July 1, 1996, deadline.

In 1997, the legislature passed Senate Bill 108 which generally revised the water adjudication laws relating to different types of decrees. This legislation authorized the Water Court to adjudicate water right claims and to review federal reserved water right compacts when necessary, and without the need to wait until other types of claims in the same basin were ready to be included into a decree. In addition, the bill added two new sections to the law. One required objections to be filed at the initial decree stage, and the other allowed claimants an opportunity to file counterobjections.

As the years went by, the resources directed to the Department of Natural Resources and Conservation (DNRC) claims examination program gradually ebbed away. During the 2003 interim, the Environmental Quality Council was advised that it would take DNRC 40 or 50 more years to complete its claim examination efforts based on DNRC's then current funding.

In 2005, the Legislature enacted House Bill 22, codified in §§ 85-2-270 through 282, MCA. The purpose of the legislation as set forth in § 85-2-270(1) is to:

- (a) complete claims examination and the initial decree phase;
- (b) reexamine claims . . . , and
- (c) ensure that the product of the adjudication is enforceable decrees.

Section 85-2-270(2) states:

With adequate funding, it is realistic . . . to complete claims examination and reexamination . . . by June 30, 2015. It is also realistic and feasible for the water court to issue a preliminary or temporary preliminary decree by June 30, 2020, for all basins in Montana.

### **The 2005 Legislative Goals will be Achieved**

The DNRC and Water Court are on track to meet the 2005 legislative goals. All claims will be examined by 2015 or before, and initial decrees (i.e., a preliminary or temporary preliminary decree) will be issued in all basins by June 30, 2020 or before. After the objections to all initial decrees have been resolved, the Water Court decrees will be enforceable. Sections 3-7-212 and 85-5-101, MCA. At that point, the stated purpose and stated goals of HB 22 will be reached.

### **Final Completion Date**

There may be some misconceptions about what it means to "issue a preliminary or temporary preliminary decree by June 30, 2020." In the Legislative Fiscal Division's 2015 Biennium Budget Analysis, the narrative at page D-23 discusses *Potential Funding Issues for Water Adjudication* and states that the "Water Court would have an additional five years to finish the process by issuing preliminary or temporary preliminary decrees by June 30, 2020."

The adjudication will not be complete by June 30, 2020. That date represents the statutory deadline to issue an initial temporary preliminary or preliminary decree in all the 85 hydrological basins within Montana. After a decree is issued, it takes about two years to complete the statutory notice requirements for the objection, counterobjection, and intervention deadlines. Only after these deadlines have expired can the Court staff even begin the process of resolving issues, adjudicating water rights, and working toward final decrees.

Additionally, before final decrees can be issued in all the hydrological basins, the temporary preliminary decrees issued before March 28, 1997 must be reissued and an objection opportunity provided to basin water users. Finally, all final and preliminary decrees must be reopened and reviewed as required by the 1989 Legislature, and all "late" claims authorized to be filed by the 1993 Legislature must be incorporated into the adjudication decrees issued before July 1996. See Sections 85-2-221(3) and 85-2-237, MCA.

All of these legislative requirements will extend the adjudication completion date beyond June 30, 2020.

In its June 2010 Performance Audit Report, the Legislative Audit Division forecast the Water Court would need until 2028 to complete the adjudication. *Report* at 35. The Water

Court estimates completion will occur near the same date. This estimate depends on many assumptions, including staffing levels, the amount of objections by water users, the number of issue remarks that must be resolved under § 85-2-248, MCA, the amount of resources consumed by adjudicating federal and Tribal reserved rights and compacts, and resolving challenges by the federal government to the adjudication process, and many other factors beyond the Court's control.

If there is a current legislative perception or expectation that the passage of HB 22 in 2005 was designed to finish all adjudication work by June 30, 2020, then the Legislature may want to revisit this issue and reevaluate its adjudication goals.

### **Current Status of Adjudication**

Within the state's 85 hydrological basins, the Water Court has issued 6 final decrees, 25 preliminary decrees, 42 temporary preliminary decrees, and 11 reserved water right compact decrees. The DNRC has completed most of its claims examination and has prepared or is preparing summary reports (basically draft decrees) for Water Court review. The Water Court anticipates issuing decrees in the Red Rock River (Basin 41A), the Beaverhead River (Basin 41B), and the Milk River above Fresno Reservoir (Basin 40F) within the next few months.

The Water Court is continuing to work through its expanding inventory of water right claims that have unresolved objections, issue remarks, motions to amend, and claims certified to the Water Court by the DNRC or District Courts. The Water Court is primarily working on water right claims in the following basins:

Basin	Sources	Claims in Decree	Remaining Claims to Resolve
40B	Flatwillow Creek	3,677	1,218
40J	Milk River Between Fresno Reservoir & Whitewater Cr.	12,897	4,201
40M	Beaver Creek, Tributary of Milk River	2,942	776
40O	Milk River Below Whitewater Creek	3,306	134
40R	Big Muddy Creek	2,029	282
41D	Big Hole River	3,892	661
41I	Missouri River upstream of Holter Dam to Three Forks	5,168	128
41J	Smith River	2,719	894
41K	Sun River	2,856	100

41O	Teton River	2,541	159
41Q	Missouri River from Sun River to Marias River	4,127	355
41QJ	Missouri River from Holter Dam to Sun River	2,584	219
41R	Arrow Creek	2,179	675
41T	Missouri River from Marias River to & including Bullwhacker Creek	3,073	Decree issued 4/19/2012 - Extended objection deadline 4/12/2013.
42B	Tongue River above & including Hanging Woman Creek	1,345	205
42C	Tongue River below Hanging Woman Creek	4,710	824
42KJ	Yellowstone River between Bighorn and Tongue Rivers	4,767	60
43A	Shields River	3,395	106
43B	Yellowstone River above & including Bridger Creek	4,860	315
43E	Pyror Creek	629	436
43O	Little Bighorn River	1,176	1,132
43Q	Yellowstone River between Clarks Fork Yellowstone and Bighorn Rivers	2,473	86
76F	Blackfoot River	3,717	1,341
76HF	Bitterroot River - Westside Subbasin	3,774	92
<p>The United States of America, Fish and Wildlife Service, National Bison Range - Montana Compact was issued September 30, 2011. One objection was received by the objection deadline. The settlement period expires on June 30, 2013.</p> <p>The Crow Tribe-Montana Compact was issued December 21, 2012. The deadline to file objections to the Compact is June 24, 2013.</p>			

If the subcommittee has any questions, I would be pleased to respond to any questions.

Sincerely,



C. Bruce Loble  
Chief Water Judge